THE FEDERAL TRADE COMMISSION AND ITS RELATION TO THE COURTS

By Cornelius Lynde,
Attorney at Law, Chicago, Ill.

The Trade Commission has proceeded very slowly and cautiously in feeling its way. Its actions have been in addition hampered by the failure of Congress to appropriate much money for its needs. It is probably true, also, that the business depression prevailing at the time the commission was organized and the uncertainty of business conditions have had their influence with the commission in inducing it to proceed slowly. That this is the course of wisdom is apparent. There have been, however, no decisions in the courts construing these new laws with perhaps one minor exception. It must be remembered, therefore, that this discussion is necessarily an attempt to prophesy based upon analysis. It is hoped that this discussion may suggest some of the questions which the courts will be called upon to determine in construing the powers and duties of the Trade Commission.

The opportunity for the courts to affect the functions of the Trade Commission must arise in one of three ways: by reason of an appeal from a proceeding before the commission and the review by the courts of the acts of the commission in such proceeding; or secondly, the interpretation by the courts of the language of the statute creating the powers and duties of the commission, whether such question of interpretation arises on appeals from the commission or in other proceedings; or thirdly, the use of the power of the courts to compel officers of the government to exercise the functions, duties and authority vested in them by law. Assuming that the Trade Commission acts within the powers given to it by the statute, when the Trade Commission compels the filing of reports or performs its investigatory functions in the future, the courts will not be much concerned. Of course if the commission seeks to exercise arbitrary power, that is, power not granted to it by the law or an unwarranted or excessive extension of powers granted, the courts will always be open to prevent such abuse. But with the

single exception to be hereafter noted[1] practically the courts will exercise their powers in relation to the Trade Commission either by way of appeal and review or by way of interpretation of the statute. All questions of the constitutionality of the statute itself are of course comprehended within the exercise of the power of interpretation. We will first discuss therefore the manner in which the commission is to conduct its hearings and the courts to review the results thereof.

Section 5 of the Trade Commission Act lays down first the general rule against the use of unfair methods of competition in commerce and then provides the manner in which the commission shall enforce this rule. This is done by the filing of a complaint by the commission, prepared by the commission and filed before itself. The hearing is conducted by the commission and there are specific provisions in the section for the preservation of the rights of parties to such hearings which may be said generally to comply with the requirements of due process of law. The commission as the result of such hearing is empowered to enter an order directing the defendants to cease and desist from using the method of competition found on the hearing to be unlawful. Its order, however, is not self-enforcing and only becomes actively effective when the commission as a litigant shall have sued out a writ of injunction in the Circuit Court of Appeals for the circuit where the method of competition in question was used. This injunction is obtained by a review by the court of all the proceedings before the commission, in which review, however, the findings of the commission as to the facts, if supported by testimony, shall be conclusive. Exactly the same procedure is provided where any party required by an order of the commission to cease and desist from using a particular method of competition desires to set aside the order of the commission in case the commission itself has failed to apply for the injunctive order in the court. That the hearing in the Court of Appeals must be entirely upon the record made before the commission is plain from the fact that the section provides machinery for the taking of additional evidence by the commission if good cause be shown to the court. The jurisdiction of the Circuit Court of Appeals "to enforce, set aside or modify" orders of the commission shall be exclusive.

[1] *See* discussion of Sec. 7, Master in Chancery function.

This in brief is an outline of the machinery provided and the method of review established. There are several things in these provisions which may be regarded as out of the ordinary. The fact that in one proceeding in reference to a particular unfair method of competition the commission must occupy the positions of first being complainant before the commission and then trier of the facts and the law on such proceeding, and thereafter complainant in the Court of Appeals for the purpose of enforcing the result of its determination, is unique, it is believed, in our jurisprudence. The original Act to Regulate Commerce provided that the Interstate Commerce Commission could only make its order effective by suing out injunctions in the Circuit Courts of the United States, but in such proceedings there was a trial *de novo* and the Circuit Court was not confined to the record made before the Interstate Commerce Commission, and of course the Interstate Commerce Commission did not in fact file complaints before itself, but entertained and passed upon complaints filed by ordinary litigants.

The power given the Interstate Commerce Commission to order general investigations is practically, however, the power to institute proceedings and the Commerce Commission has upon occasion attempted to enforce by proceeding in the courts the conclusions reached as the result of such general investigations.

There is still another provision of the law not mentioned so far which deserves consideration. The language of the statute covering the filing of complaints by the commission before itself is as follows:

> Whenever the commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and *if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public*, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect, etc.

The commission, therefore, is not apparently required to file complaints as to *every* matter brought to its attention, but only when the commission finds as a fact that the entertaining by it of such complaint will be to the interest of the public. It was probably the intention of the framers of this section that the commission should be vested with a certain discretion in relation to the entertaining or filing of complaints. The exercise of this would prevent

the commission from being used improperly for the disturbance of legitimate business conditions and practices, and the making effective of such intention undoubtedly will prove of benefit. In spite of this proper intention, however, the exact interpretation of the language quoted is a matter of great difficulty.

The commission is given a specific duty. This cannot be disputed. It must carry on its functions for the purpose of preventing the use of unfair methods of competition. The same section declares such methods to be unlawful and the entire purpose of the creation of the commission is to render effective this declaration of illegality by the due exercise of the powers given to the commission. It must, therefore, follow that in a proper case the courts may be called upon to issue a writ of mandamus to compel the commission to perform this duty if the commission has refused so to do. It would not be constitutional for Congress to declare that the commission alone shall be vested with authority to determine whether it has a legal duty to perform in a particular set of circumstances.

The difficulty is that there is nothing in the law providing for the manner in which informations or complaints may be filed with the commission for the purpose of causing the commission to "have reason to believe" that a violation of law has taken place. Under sub-section G of section 6 of the act, the commission is given power "from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act." The commission has under this power adopted rules providing for the filing of complaints with it, and it may be that this action of the commission will supply the omission of Congress to cover specifically this matter in the statute.

Section 5 provides, as noted above, that the findings of facts of the commission on proceedings before it under the section shall be conclusive. But, what is meant by "findings of facts," and how far will the courts actually be bound by the determination of the commission? In the first place, are the findings of the commission as to jurisdictional facts conclusive? Take the matter just discussed. The commission can only file a complaint when it finds that the entertaining of a proceeding will be "in the interest of the public." It must, therefore, in its order so find. Plainly such a finding could not be conclusive upon the Circuit Court of Appeals, and if the Circuit Court of Appeals should disagree with

the commission as to the "interest of the public" it would necessarily dismiss the entire proceeding. This would be equally true of any other jurisdictional fact.

The language of the rule that the Federal Trade Commission has adopted covering this matter is illuminating. Rule 2 provides for the filing of complaints by individuals before the commission for the purpose of applying to the commission to institute a proceeding in response to violations of law over which the commission has jurisdiction. The rule then provides,

> The commission shall investigate the matters complained of in such application and if upon investigation the commission shall have reason to believe that there is a violation of law over which the commission has jurisdiction,

the commission shall then proceed in accordance with the act. There is nothing in this rule about any finding by the commission as to "the public interest," except that the commission may believe it only has jurisdiction over matters involving the public interest. It is submitted that the language of the rule is more consistent with the interpretation of the prohibition against the use of unfair methods of competition suggested later on. It is difficult to see how the Trade Commission can fulfill its duty of preventing the use of unfair methods of competition in commerce if the language referred to, that is, the provision as to the public interest, is a limitation upon the commission's power, unless it be the fact that every violation of the rule against unfair methods of competition involves the public interest.

The real question presented by this law and the one about which the greatest uncertainty prevails is the meaning of the expression "unfair methods of competition" and the extent to which the prohibition against their uses will be carried.

There are several matters which should be cleared away before the real question is approached. In the first place the expression "unfair methods of competition" is new in the law. The original draft of Section 5 uses the language "unfair competition" and it was suggested before the Senate Committee on Interstate Commerce to which this draft was first submitted, that the courts had applied certain rules in relation to unfair competition and the decisions in this connection might limit the meaning which should be attached to the statute if this identical phrase of "unfair competition" was used. The courts had held that practices by which the goods of

one man were attempted to be foisted upon the public as the goods of another through misrepresentation, etc., was unfair competition. There were expressions in some of the decisions which might have led to the conclusion that this character of transaction was the only thing which could be called unfair competition at common law but such expressions were, of course, never necessary in the cases which employed them and obviously there was no case squarely holding upon the issues involved that any such limited subject matter was comprehended within the meaning of the phrase "unfair competition." But in order to obviate the possibility of any narrowing of its prohibition by previous construction of the language by the courts, Congress changed the expression to "unfair *methods* of competition."

It should be noted, also, that in various decisions construing the Sherman Law and more particularly in consent decrees entered in suits brought by the government in order to restrain violations of the Sherman Law, the phrase "unfair competition" is to be found. So that even without the change in language there was basis for fairly claiming the courts had already applied the expression "unfair competition" to practices, which might be condemned under the prohibition of the Sherman Law.

In the Standard Oil Decision, Mr. Chief Justice White comes as close to giving a definition of the extent and application of Sections 1 and 2 of the Sherman Law as can be found, where he says: (P. 61.)

> In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

Section 1 of the Sherman Law forbids contracts, combinations or conspiracies in restraint of trade; in other words there must be concerted action between two or more individuals or corporations. The actions of a single person or corporation could not come within the purpose of the first section, but the second section, as is shown by the language above, forbids any attempt to monopolize or actual monopolization and the court says, not only in the language quoted

but elsewhere in the opinion, that restraint of trade and monopoly or attempts to monopolize are to all intents and purposes synonymous. Therefore it follows that the second section of the act would apply to the acts of an individual or corporation if such acts, carried to a final conclusion, would result in monopolization or what might be construed as a direct attempt toward such end. It would seem that the first and second sections of the Sherman Law cover the same subject matter, the first section being directed at acts which are the result of concerted action or combination of individuals, the second section being aimed at the same acts when done by individuals.

In the American Tobacco Company case, the decision in which was handed down at the same time as the Standard Oil decision, the Supreme Court used expressions again, in the opinion of Mr. Chief Justice White, which renders the matter still more plain. He said (at p. 179):

> Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. . . . . Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the Standard Oil Case that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, *embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed.* That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute. (Italics are mine.)

It may, therefore, be said that every act which interferes with the due course and freedom of commerce or which operates as a

restraint of trade whether the result of combination or the individual acts of a person or corporation, is in violation of the prohibition of either Section 1 or Section 2 of the Sherman Law.

It is said so often in the two decisions referred to above and in numerous other decisions as not to need citations in support that the real purpose or public policy to enforce which the Sherman Law was passed was the preservation of the individual right to contract unobstructed by improper acts of others, and further the preservation of the free flow of commerce unobstructed by improper trammels. In other words, the policy is not limited to the preservation of freedom of contract. Freedom of action in other form than contract is also sought.

Can there be an unfair method of competition in commerce which does not interfere either with the freedom of contract or the free and unrestricted flow of commerce? Does it not follow that the prohibition of Section 5 of the Federal Trade Commission Act against the use of unfair methods of competition in commerce is merely a prohibition of acts which are forbidden by Sections 1 and 2 of the Sherman Law? This does not mean, of course, that Section 5 does not create an entirely different and, in a sense, supplementary method of preventing the evils against which the Sherman Law was aimed.

The conclusion that the prohibition of Section 5 covers the same field as the prohibition of Sections 1 and 2 of the Sherman Law is strengthened by the fact that there is no method of competition which has been held by the courts to be unfair, which has not been enjoined by the courts in proceedings instituted for the enforcement of the Sherman Law.

All that the Trade Commission Act does, therefore, is to create supplemental remedies and additional machinery for the enforcement of the intention of the Sherman Law.

There are many things in the Trade Commission Act itself which lend support to this conclusion. In the first place, Section 6 of the act gives the Commission power to investigate violations of the anti-trust acts. It is given power to investigate the manner in which final decrees entered in proceedings instituted by the attorney general to enforce the anti-trust acts have been carried out and this upon the initiative of the commission. It is given the power not only to investigate but to make recommendations for the

readjustment of the business of any corporation alleged to be violating the anti-trust acts.

Section 7 of the act, providing that the commission may act as master in chancery in fixing the form of the decree in anti-trust proceedings, is discussed hereafter. The fact that it is specifically provided in Section 11 that nothing in the act shall be taken to alter, amend, modify or repeal the anti-trust acts and also that it is provided in Section 5 that no order of the commission or judgment of the court to enforce the same shall in any wise relieve any person, etc., from liability under the anti-trust acts, does not make against this interpretation. The provisions last cited merely strengthen the conclusion that the remedies of the Trade Commission Act are cumulative and supplemental to those of the Sherman Law.

Section 9 of the Federal Trade Commission law contains a provision equivalent to the ordinary immunity provisions of the Interstate Commerce and Bureau of Corporation laws. Since there is no penalty imposed for a violation of the rule of Section 5 there would be no necessity for any immunity provision applicable to hearings under this section unless it was obvious that the facts and issues involved were those which might be the subject of criminal proceedings. It is true the language of the immunity provision referred to does not apply specifically to hearings under Section 5 but would include any investigations by the commission, yet, nevertheless, it is equally true these provisions must apply to the hearings under Section 5. Congress may be said, therefore, to have recognized that these hearings would involve Sherman Law issues.

If the construction suggested be adopted, it greatly clarifies some of the uncertainties attending the questions of procedure. Every undue restraint of trade is a matter in which the public is interested. It, therefore, follows that, if the Trade Commission have reason to believe that an act of unfair competition, or, in other words, an undue restraint of trade or attempt to monopolize has taken place, the duty of the commission to file complaint and proceed forthwith in accordance with the provisions of Section 5 is plain and the commission has no discretion in the matter. It follows as a matter of law that the public interest is involved.

In speaking of the course of the common law in dealing with

restraints of trade and monopoly in the Standard Oil case, Mr. Chief Justice White says:

> Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, lead, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

In other words, injury to the public is necessarily involved in any act or combination which interferes with the free flow of commerce or the unrestricted opportunity of one member of the public to compete with another, and unfair methods of competition, if indulged in to the injury of competitors, necessarily injures the public. And it could hardly be claimed that the Trade Commission was given any discretion as to the extent of public injury to be involved.

The Federal Trade Commission is unique in respect to one of its functions. It is the only commission created by Congress possessing any of the characteristics that are ordinarily understood as commonly belong to "Commissions," which is vested with a distinctly defined judicial function. Section 7 of the Trade Commission law provides that in suits in equity under the direction of the attorney general for enforcement of the anti-trust acts, the court may, on the conclusion of the testimony, if it be of opinion that the complainant is entitled to relief, refer the suit to the commission "as a master in chancery to ascertain and report a proper form of decree therein." The section then provides that the commission shall proceed upon such notice to the parties, and under such rules of procedure as the court may prescribe, and on the coming in of the report exceptions may be filed and the ordinary proceedings had as in the case of the report of a master in chancery in equity

causes, "But the court may adopt or reject such report in whole or in part and enter such decree as the nature of the case may, in its judgment, require."

A master in chancery is a distinctly judicial officer. He is in one sense an assistant judge. In another sense he is the jury determining the facts in equity causes, although his function is never limited to a mere determination of the facts. It would seem that the defendants in such proceedings might well object to the interposition of the Trade Commission, and if it could be made to appear on the record in any way whatsoever that the rights or interests of the defendants were in any manner affected by such reference, it is doubtful whether the court would have power to order the reference.

Another matter that should be noted in connection with this section is the very vague definition of the Trade Commission's function. The reference is for the purpose of ascertaining and reporting "a proper form of decree." Whether this would include in any sense a passing upon the evidence and a determination of the ultimate facts upon which the decree was to be founded, is very doubtful. It can hardly be believed, however, that Congress would enact this section for the mere purpose of having the Trade Commission draw up the formal part of a Sherman Law decree. The language used, unfortunately, would seem to indicate that this was nevertheless the intention of Congress. If the courts come to the conclusion that the only function of the Trade Commission under this section is to pass upon the form of the decree without passing upon the merits of the case or discussing disputed questions of fact or questions of law, it is almost certain that the practice devised will never be used. The debates in Congress, however, show that such was not the intention at the time this section was adopted in spite of the unfortunate language used. It was intended that the Trade Commission should exercise some real, if undefined, influence in the decision of anti-trust cases.

When it is remembered that the principal duty of the Trade Commission under Section 5 of the act, and by all odds the most important duty that it has, is to enforce the rule against unfair methods of competition and further that unfair competition is in all instances at the base of anti-trust proceedings, the propriety of providing some machinery by which proper coördination will take

place between the acts of the Trade Commission and the rulings of the courts is plain.

If there should be presented, for instance, in an equity proceeding brought by the Attorney General to prevent violations of the anti-trust laws, issues of fact involving unfair methods of competition, the propriety of obtaining the opinion of the Trade Commission upon such facts is obvious. The Trade Commission under Section 5 is vested with the power, and has the emphatic duty, of preventing the use of unfair methods of competition. It alone can file complaints. It would seem absurd to have the Trade Commission proceeding along independent lines, while the Attorney General at the same time is seeking injunctions in the federal courts, both proceedings being directed to the same end. When it is seen also that Section 5 provides for an appeal to the same courts which are entertaining the Attorney General's proceeding, the wisdom of this provision is plain.

If the Trade Commission is to act as a master in chancery in equity proceedings by the Attorney General, it should bring to bear upon the questions in the proceeding all of its experience and authority. The obvious purpose of the court and the commission, whether acting jointly or independently, is to arrive at the proper enforcement of the laws, and the Trade Commission Law and the Sherman Law are inextricably bound together.

This interdependence of the courts and the Trade Commission for the obvious purpose of enforcing the same public policy is further shown by the fact that in Section 6 the commission is given the power upon the application of the attorney general "to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts in order that the corporation may thereafter maintain its organization, management and conduct of business in accordance with law." It is very probable that the Department of Justice will adopt the procedure suggested by this section and refer all matters to the Trade Commission before bringing suit to enforce the anti-trust law. This will make the Trade Commission the most important body in connection with anti-trust procedure or enforcement. Their function is so important, anyway, that such a policy of the Department of Justice would be of great benefit. The business man would feel that turning over the decision as to the institution of criminal or

other proceeding to an expert tribunal, not the officers of the law vested with the duty of taking care of criminal matters, but a body composed of business experts, would afford to the honest business man much greater protection than the present arrangement.

If this procedure be adopted and the interpretation of the prohibition against the use of unfair methods of competition in commerce be that adopted by the courts, we will have a harmonious workable system. This will turn over the law of business competition to an expert tribunal. The folly of having the lawfulness of business development and legality of new forms of business expansion left for determination to the officers of the government who must prosecute criminals has long been apparent. In framing these laws Congress has been careful not to hamper the enforcement of justice. The Trade Commission can only "recommend." But plainly only grave and wilfully intentional business abuses will now come to the Department of Justice for action. Yet the lesser abuses will fall to the commission for correction, and will not go unchecked any longer. And the law of business competition will have an opportunity for careful, coördinated, intelligent development.